QUILLEN v. COMMONWEALTH.

June 21, 1906.

[54 S. E. 333.]

1. **Criminal Law—Appeal—Record.**—Denial of a motion to quash an information on the ground that it was not founded on a complaint in writing sworn to by a competent witness, as required by Code, 1887, § 3990 [Va. Code 1904, p. 2099], cannot be reviewed; the fact relied on not appearing on the face of the information and not being shown by bill of exceptions.

2. **Same—Limitation of Prosecution—Intoxicating Liquors — Sales without License.** — A prosecution for retailing liquor without a license is within Code 1887, § 577 [Va. Code 1904, p. 286], providing a limitation of two years for prosecutions for violations of the revenue law.

3. **Intoxicating Liquors—Prosecutions—General and Special Laws.** —Act Feb. 29, 1892 (Acts 1891-92, p. 814, c. 510), entitled "an act to suppress tippling houses, and the illegal and unlawful traffic in ardent spirits in" certain counties, not being exclusive of the general law, but being declared by section 10 to be in aid of the revenue law of the state, does not prevent a prosecution in one of such counties under the general revenue statute (Acts 1902-04, p. 155, c. 148), which in section 143 (page 224) declares the sale of intoxicating liquors without a license a misdemeanor punishable by fine, and in the discretion of the court by imprisonment, though such section provides that it shall not be construed as repealing any special act prohibiting the sale of liquor.

4. **Witnesses—Competency—Punishment for Felony.**—Under Code 1904, § 4075, providing that confinement in jail under a capias pro fine shall not exceed a certain number of days for a certain number of dollars of fine and costs, but that nothing in the section shall prevent the issue of a writ of fieri facias after the release of the person so confined, his fine is not paid, and he is therefore not fully punished, by such confinement, and so is incompetent, under section 3898, providing that a person convicted of felony shall not be a witness unless he has been pardoned or punished therefor.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fines, §§ 7, 12; vol. 50, Cent. Dig. Witnesses, §§ 112-118.]

5. **Same—Conviction of Felony.**—Under Code 1904, § 3879, declaring offenses punishable with death or confinement in the penitentiary to be felonies, and all other offenses to be misdemeanors, the offense which section 3671, Code 1887 [Va. Code 1904, p. 1965], declares shall be punished by confinement in the penitentiary, except that in certain cases the jury may, in their discretion, assess the punishment at confinement in jail and a fine, is a felony, so that one convicted thereof, though having his punishment assessed at confinement in

jail and a fine, is within section 3898, providing that a person convicted of a felony shall not be a witness unless he has been pardoned or punished therefor.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 29-31; vol. 50, Cent. Dig. Witnesses, §§ 108-114.]

Appeal from Circuit Court, Scott County.

W. F. Quillen was convicted of selling liquor without a license, and appeals. Reversed.

Richmond & Bond and *W. S. Cox*, for plaintiff in error.
W. A. Anderson, Atty. Gen., for the Commonwealth.

WHITTLE, J. At the May term, 1905, of the circuit court of Scott county, the plaintiff in error, W. F. Quillen, was tried and convicted for selling by retail wine, ardent spirits, malt liquors, or some mixture thereof, without a license. The jury assessed his fine at $200, and the court imposed the additional punishment of confinement in jail for 90 days.

The first assignment of error is to the action of the court in overruling the motion of the accused to quash the information The grounds relied on to sustain that motion are that the information was not founded upon a complaint in writing verified by the oath of a competent witness, as required by statute (Code of 1887, § 3990 [Va. Code 1904, p. 2099]), and because the offense is charged to have been committed within two years prior to the filing of the information, whereas it is alleged that the crime is a misdemeanor, the prosecution of which is limited to one year by section 3889 of the Code [Va. Code 1904, p. 2064].

The first ground relied on not being apparent upon the face of the information, and not having been incorporated in the record by proper bill of exceptions, upon a familiar rule of practice, cannot be availed of in this court. The information is in the usual form, reciting "that Elijah White has made complaint and information in writing and on oath," etc.; and it was incumbent upon the accused, in support of his motion to quash, to show that there was no complaint in writing, and that Elijah White was not a competent witness, neither of which facts appear from the bill of exceptions. Davis' Crim. Law, 475, 476; Synopsis of the Law of Crimes and Punishments (Minor) 307; 1 Bar. Law Pr. 673 et seq.; West *v.* Richmond Ry. & Elec. Co., 102 Va. 339, 46 S. E. 330.

The second contention is based upon a casual remark of the learned judge who wrote the opinion in the recent case of Harding *v.* Commonwealth, 105 Va. —, 52 S. E. 832, that the limitation to a prosecution for the sale of liquor, in violation of the provisions of a special act applicable to Lancaster county (Acts 1901-02, p. 601, c. 516), was one year, under section 3889

of the Code. But the question of limitation did not arise in that case, it appearing that the offense was committed within one year prior to the issuance of the warrant, and what was said on the subject was, therefore, not necessary to the decision of the case.

Section 3889 prescribes the limitation with respect to the prosecution of crimes generally, including misdemeanors, while section 577 of the Code [Va. Code 1904, p. 286] applies especially to prosecutions for violations of the revenue laws, fixing the limitation in such case at two years.

The case in judgment is a prosecution for a violation of the state revenue law and is accordingly controlled by section 577, and not by section 3889.

We are further of opinion that this is a prosecution under the general revenue statute declaring the sale of wine, ardent spirits, malt liquors, or any mixture thereof, without a license, to be a misdemeanor, punishable by a fine of not less than $20, and, in the discretion of the court, by imprisonment not exceeding 12 months (Acts 1902-04, § 143, pp. 217, 218, c. 148), and not, as contended, a prosecution under the special act, entitled "An act to suppress tippling houses, and the illegal and unlawful traffic in ardent spirits in the counties of Lee, Pulaski, Scott, Wise, Dickenson, Buchanan, Bland, and Russell," approved February 29, 1892 (Acts 1891-92, p. 814, c. 510).

That contention is evidently founded upon a misapprehension of the decision in Harding *v.* Commonwealth, supra, which was a prosecution under a special act approved April 2, 1902, to suppress the illegal sale or traffic in ardent spirits in the counties of Lancaster, etc. (Acts 1901-02, p. 601, c. 516). By section 9 of the foregoing act it is declared: "This act shall be so construed as to suppress the evil prohibited, and shall be taken to be in aid of the local option laws adopted by the said counties; but no penalty shall be imposed except as herein provided for." In the above-mentioned case, at page 834 of 52 S. E., it is said: "The ruling of the court below sentencing the defendant to two days' confinement in the county jail, in addition to the fine imposed by the verdict of the jury, is assigned as error.

"There is no authority for this ruling, unless found in the act approved April 16, 1903 (Acts 1902-04, p. 155, c. 148), where, in section 143, at page 224, with reference to unlawful liquor selling, it is provided: 'A violation of the provisions of this section shall be deemed a misdemeanor, and shall be punished by fine of not less than twenty dollars, and, in the discretion of the court, by imprisonment not exceeding twelve months.' But that section, at page 220, contains also the provisions 'that this section (section 143) shall not be construed as repealing any

special act prohibiting the sale or manufacture of ardent spirits in any county, district or town.'

"By the eighth section of an act approved April 2, 1902 (Acts 1901-02, p. 602, c. 516), which is a special act to suppress 'the illegal and unlawful sale or traffic in ardent spirits' in Lancaster county, it is provided 'that any person who is found guilty under the provisions of this act shall be fined not less than fifty nor more than five hundred dollars, and may be imprisoned until said fine is paid.'

"This statute remains in full force, and therefore the act of April 16, 1903, supra, was inoperative in the county of Lancaster when this case was tried, so that the court was without the authority to sentence the defendant to confinement in the county jail in addition to the fine imposed by the verdict of the jury."

"On the other hand, the act approved February 29, 1892, is not exclusive of the general law, but affords a cumulative remedy. The act expressly declares, at section 10, that it "shall be taken to be in aid of the revenue laws of the state." So that it is competent for the commonwealth to prosecute offenses against the revenue laws in the counties embraced in the special act, either under that act or the general revenue statute. As we have seen, it elected in this instance to proceed under the general law, which, as remarked, declares a violation of the act to be a misdemeanor, punishable by a fine of not less than $20 and, in the discretion of the court, by imprisonment not exceeding 12 months.

It follows, therefore, that the assignment of error denying the authority of the court to inflict a jail sentence upon the accused, in addition to the fine imposed by the jury, is not well taken.

The next assignment of error involves the ruling of the court in admitting the testimony of Elijah White over the objection of the plaintiff in error. The ground of objection to the competency of the witness is that he had been convicted of a felony for which he had neither been pardoned nor punished at the time of testifying.

The statute on the subject is as follows: "Except where it is otherwise expressly provided, a person convicted of felony should not be a witness, unless he has been pardoned or punished therefor, and a person convicted of perjury shall not be a witness, although pardoned or punished." Va. Code, 1904, § 3898.

The witness had been tried and convicted under section 3671 of the Code of 1887 [Va. Code 1904, p. 1965] for unlawfully shooting and wounding with intent to maim, disfigure, disable, and kill, and sentenced to 90 days imprisonment in jail and to pay a fine of $25. He had served out his term of imprisonment, and, upon a capias pro fine, was held for 60 days in jail, but had not paid the fine or costs of prosecution.

In sustaining the competency of the witness, the trial court seems to have been of opinion that his confinement in jail for 60 days on capias pro fine was a satisfaction of the fine and costs; and it is strenuously argued by the Attorney General that the offense of which he was convicted was not a felony.

The statute affords a complete answer to the first proposition. After describing certain limitations to imprisonment for fines, it expressly provides, that "nothing herein or in the preceding section shall prevent the issue of a writ of fieri facias after such releases from jail." Acts 1895-96, p. 686, c. 626; Va. Code 1904, § 4075.

This shows that the fine and costs are not satisfied by the imprisonment, which is but a means of enforcing payment, and the punishment is not complete until the judgment of the court has been fully discharged.

With respect to the remaining contention, the statute declares, that, "offenses are either felonies or misdemeanors. Such offenses as are punishable with death or confinement in the penitentiary are felonies; all other offenses are misdemeanors." Va. Code 1904, § 3879.

In Benton's Case, 89 Va. 570, 16 S. E. 725, the accused was prosecuted under the statute, now found in Va. Code 1904, §§ 3705, 3706, for housebreaking, etc. The latter section reads: "If any person do any of the acts mentioned in the preceding section with intent to commit larceny, or any felony other than murder, rape, or robbery, he shall be confined in the penitentiary not less than one nor more than ten years, or, in the discretion of the jury, confined in jail not exceeding twelve months and fined not exceeding five hundred dollars." The accused was convicted of breaking and entering a house in the nighttime with intent to commit larceny, and the jury fixed his punishment at 12 months in the county jail, and imposed upon him a fine of $5. Subsequently, he was offered as a witness on behalf of the commonwealth in a prosecution against Benton, who objected to his competency on the ground that he had been convicted of a felony for which he had not been punished or pardoned; but the court overruled the objection and allowed the witness to testify. Upon writ of error, the judgment of the trial court was reversed, this court holding that the witness was guilty of a felony, and not having been punished or pardoned was an incompetent witness. The court said, that a felony is such an offense as may be, not must be, punished by death or confinement in the penitentiary; and that the Legislature did not intend to leave the grade of any offense to the discretion of a jury.

It appears, also, from section 3903 of the Code, that there are felonies which may be punished otherwise than by death or con-

finement in the penitentiary. It provides: "The term of confinement in the penitentiary, or in jail, of a person convicted of felony, if that punishment is prescribed, and the amount of the fine, if the felony be also punishable by fine, shall be ascertained by the jury, or by the court trying the case without a jury, so far as the term of confinement and the amount of the fine are not fixed by law." See, also, Barker's Case, 2 Va. Cas. 122; Forbes *v.* Comth., 90 Va. 550, 19 S. E. 164.

The doctrine is fully sustained by Professor Minor. "In quite a number of cases our Virginia Statutes submit it to the discretion of the jury whether an offense shall be punished with confinement in the penitentiary or in jail, or by fine only; and in those cases it may be a question whether the act is a felony or a misdemeanor. The doctrine seems clearly established that in such cases, whatever may be the verdict of the jury, the offense is always to be deemed a felony. 1 Bish. Crim. Law (7th Ed.) § 619; 4 Am. & Eng. Enc. of Law, p. 651; Johnson *v.* State, 7 Mo. 183; Canada's Case, 22 Grat. 899; Benton's Case, 89 Va. 572, 16 S. E. 725; State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578; State *v.* Mayberry, 48 Me. 218, 236; State *v.* Waller, 43 Ark. 381." Synopsis of the Law of Crimes and Punishments (Minor) p. 17.

In the Cyclopædia of Law and Procedure, the rule is thus stated: "In many states, by statute, all crimes which are punishable in the state prison or penitentiary, with or without hard labor, are felonies. A crime is a felony under such a statute, if it may be punished by imprisonment in a penitentiary or state's prison, although the court or jury may in its discretion reduce the punishment to imprisonment in jail or fine, and although such punishment is in fact imposed." 12 Cyc. pp. 132, 133; 8 Am. & Eng. Ency. of Law (2d Ed.) 281, and authorities cited in notes.

Against this array of authorities our attention has been called to but two cases maintaining a contrary doctrine, namely, Lamkin *v.* People, 94 Ill. 501, and Baits *v.* People, 123 Ill. 428, 16 N. E. 483.

It is clear that White was an incompetent witness, and his testimony ought to have been excluded.

As the conclusion which we have reached in the case necessitates a new trial, it is unnecessary to consider the assignment of error with regard to the action of the trial court in overruling the motion for a continuance.

The judgment must be reversed, and the case remanded for a new trial.

KEITH, P., absent.

Note.

The decision in this case, that a person who has been given a jail sentence for a felony and in addition a fine, has not served out his

sentence sufficiently to be restored to competency as a witness, although he serves the jail sentence, and upon a capias pro fine, is held for such a time in jail as will satisfy the fine, is most extraordinary and harsh, it would seem, but, at the same time, unavoidable in the light of the statute. In short, fine and costs are not satisfied by imprisonment, which is but a means of enforcing payment.

The modern tendency is toward a greater liberality in the admission of evidence. Moreover by statute in most of the states the fact that a witness has been convicted of any crime, however that crime may imply or indicate his utter lack of respect for truth, is no objection to his competency, but is admissible to affect his credit in all instances in which, under the rules of the common law, the witness would have been held to have been incompetent. No state has taken a step backward which has tried this experiment. Why not make our rules governing the admissibility of evidence, and the competency of witnesses, more liberal, and leave it to the jury to judge of its weight?

FULKERSON v. CITY OF BRISTOL.

June 21, 1906.

[54 S. E. 468.]

Municipal Corporations — Assessments — Unequal Assessments. — Under the constitutional requirement of equality and uniformity of taxation, an assessment for a street improvement cannot be enforced against one property owner of a class, when all of the class originally liable to the assessment cannot be compelled to pay the assessment because of the failure of the corporate authorities to perfect the assessment against all the property before the adoption of a constitutional provision abolishing the right to make and levy such an assessment.

Appeal from Corporation Court of Bristol.

Suit by the city of Bristol to enforce payment of an assessment for a street improvement against S. V. Fulkerson. From a decree in favor of complainant, defendant appeals. Reversed.

Fulkerson, Page & Hurt and *Bullitt & Kelly,* for appellant.
Roberts & Roberts, for appellee.

CARDWELL, J. The question involved in this case is the right of the appellee, the city of Bristol, to enforce payment of a local assessment levied upon the property of appellant to defray the expenses of paving a street of the city upon which the property abuts. The improvement for which the assessment is levied, pursuant to authority in the city conferred by section 72 of its charter (Acts 1899-1900, pp. 627-640, c. 611, et seq.), was made in the year 1901, and at the December term, 1901, of the corporation court of the city, the assessment upon the property of